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AUSTIN, TEXAS.

NO. 80-1322

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MARIA EMILIA FAMILIA de BOOM, et al,
Petitioners,

versus

AROSA MERCANTIL, S.A., et al,
Respondents.

On Petition for a Writ of Certiorari to The United States Court of Appeals For the Fifth Circuit

OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

I. Whether the decision in the court below is in conflict with decisions in other circuits authorizing discovery sanctions.

II. Whether the Fifth Circuit in the decision below applied the proper test for determining personal jurisdiction.

III. Whether the decision below conflicts with this Court's deterrence policy supporting sanctions for failure to participate in discovery.

IV. Whether the decision below conflicts with this Court's decisions in *Swift & Co. Packers v. Compania Columbiana del Caribe* and *Hellenic Lines v. Rhoditis.*

V. Whether the decision below conflicts with this Court's decision in *United States v. United Mine Workers of America.*

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OPPOSITION TO PETITION FOR CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Arosa Mercantil, S.A., et al, the respondents herein, pray that the Petition for writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this matter on November 7, 1980, be denied. That Court denied petitioners' petition for rehearing and rehearing en banc on December 17, 1980.

OPINIONS BELOW

The November 7, 1980, opinion of the Court of Appeals, whose judgment is sought to be reviewed, is reported at 629 F.2d 1134, and is reprinted in the Petition (Appendix "A" pp. 1a-13a). The December 17, 1980, order of the Court of Appeals denying petitioners' petition for rehearing or rehearing en banc is not reported; it is reprinted in the Petition (Appendix "B", pp. 13a-14a). The prior decrees and orders of the United States District Court for the Southern District of Texas (of March 8, 1978; May 9, 1978; November 17, 1978; December 26, 1978; and March 6, 1979) are unreported. They are set forth in the Petition (Appendix "D" at pp. 23a-90a).

JURISDICTION

The judgment of the Court of Appeals was entered on November 7, 1980. A petition for rehearing and rehearing en banc was denied on December 17, 1980. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions are reproduced verbatim in the Petition (Appendix "C", pp. 14a-22a).

U. S. Const., Amend. V
Fed. R. Civ. P. 37(a)
Fed. R. Civ. P. 37(b)
Tex. Rev. Civ. Stat. § 2031b

The Respondents wish to include the Jones Act, 46 U.S.C. § 688, set out below:

> Recovery for injury to or death of seaman
>
> "Any seaman who shall suffer personal injury in the course of his employment may, at his election maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representatives of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.
>
> Mar. 4, 1915, c. 155 § 20, 38 Stat. 1185; June 5, 1920, c. 250 § 33, 41 Stat. 1007.

STATEMENT OF THE CASE

For convenience and ease of identification, the Plaintiffs in the District Court will be referred to herein as Petitioners. Defendant, Arosa Mercantil, S.A. in the District Court will be referred to herein as (Arosa), and Defendant, Inversiones Calmer, S.A. in the District Court will be referred to herein as (Inversiones).

Petitioners seek certiorari to review a decision and opinion of the United States Court of Appeals, Fifth Circuit, which reversed a default judgment on the issue

of liability rendered in petitioners favor by the United States District Court for the Southern District of Texas, Galveston Division. Subject matter jurisdiction in the District Court was based on the admiralty and maritime jurisdiction of the Court, 28 U.S.C. § 1333.

A. COURSE OF PROCEEDINGS AND DISPOSITION OF COURT BELOW.

On February 11, 1977, Petitioners filed their complaint against Arosa alleging damages under the Jones Act, 46 U.S.C. § 688, the general maritime law, and praying for lost wages under 46 U.S.C. § 596. [R. 1-10]. Service of process was attempted by serving Arosa's alleged agent, LaMorte Burns & Company, through the Secretary of State of the State of Texas. [R. 11].

On September 7, 1977, Plaintiffs amended their complaint adding, inter alia, Inversiones and Favrovi Shipping Company as Defendants. [R. 71-72]. Service was attempted on Inversiones by serving its alleged agent, Gulf Coast Shipping Corporation [R. 72, 77, 103]. Service was also attempted on Inversiones at its alleged corporate office in Miami, Florida, through the Secretary of State of the State of Texas. [R. 107]. Service of the amended complaint was made on Mr. W. Garney Griggs, Arosa's attorney. [R. 77, 105].

Both Arosa, [R. 37-38], and Inversiones, [R. 143-44], filed Motions to Dismiss the action under Rule 12 (b), Federal Rules of Civil Procedure, for failure to state a claim upon which relief can be granted, lack of jurisdiction over the person, insufficiency of process, insufficiency of service of process, and/or improper venue. The District Court did not rule on the Motion to Dismiss.

On March 14, 1978, the District Court granted Plaintiff's Motion for Default Judgment as to liability against Arosa for failure to comply with the discovery orders. [R. 151-52]. On May 9, 1978, the District Court granted Plaintiff's oral Motion for Default Judgment against Inversiones on the same grounds. [Transcript of proceedings, May 9, 1978, page 12].

On December 26, 1978, the District Court signed and entered Judgment assessing damages against Arosa and Inversiones, jointly, severally, and in solido, in the sum of $1,129,341.93 plus interest at 9% from January 19, 1977. This Judgment was not a Final Judgment because Favrovi Shipping Company remained as a party defendant in the action.

Thereafter, on March 6, 1979, the District Court ordered that the Judgment entered on December 26, 1978, was a Final Judgment against Arosa and Inversiones pursuant to Rule 54(b), Federal Rules of Civil Procedure. [R. 267-68]. Arosa and Inversiones filed their Notice of Appeal on March 20, 1979 [R. 272].

On November 7, 1980, the United States Court of Appeals, Fifth Circuit, reversed and remanded the Default Judgment awarded by the District Court against Arosa and Inversiones finding that the Plaintiff failed to adequately prove personal jurisdiction. Petitioners then petitioned the Court of Appeals for the Fifth Circuit for a rehearing or rehearing en banc, and the Court of Appeals denied that Petition on December 17, 1980.

B. STATEMENT OF FACTS

This case arises out of the sinking of the M/V *Ukola* in the Gulf of Mexico on January 19, 1977. The vessel

a freighter used for transporting bulk commodities had sailed from the Port of San Pedro a Marcoris, Dominican Republic, on or about January 15, 1977. Approximately two days out of port, the vessel was directed to proceed to Galveston, Texas, to off-load her cargo of sugar. As a result of the sinking, twenty of the twenty-three crewmen aboard the *Ukola* died and the vessel and its cargo of sugar was lost.

This suit was filed by the personal representatives of nine of the deceased seamen and by one survivor against Arosa, the owner of the M/V *Ukola* and Inversiones, the vessel's charterer. [R. 201].

All of the crewmen aboard the *Ukola* were Dominican citizens and were hired in the Dominican Republic. [R. 188]. Both Arosa and Inversiones are Panamian Corporations. All directors, officers and stockholders of Arosa and Inversiones are Panamian and reside in Panama.

ARGUMENT

I.

CERTIORARI SHOULD BE DENIED IN THIS CASE BECAUSE THIS CASE DOES NOT CONFLICT WITH THE OTHER COURTS OF APPEALS ON WHETHER JURISDICTION TO DETERMINE JURISDICTION WILL SUPPORT DISCOVERY SANCTIONS AGAINST DEFENDANTS CHALLENGING FEDERAL COURT JURISDICTION.

The decision in the Court below does not create a conflict among the Circuits, and is clearly distinguishable from decisions in the Fourth and Eighth Circuits. The only issue before the Court of Appeals in the case below

by their own assessment is whether the District Court had personal jurisdiction over the defendants upon which to base the default judgment. The Court of Appeals found the District Judge had never made a finding of personal jurisdiction over the defendants, and further found from reviewing the record that there was no indication or no evidence to support personal jurisdiction over the defendants. As a result, the Court of Appeals reversed the decision of the District Court and remanded the case for further proceedings to determine jurisdiction. The Petitioners would have this Court believe that this very limited decision of the Court of Appeals for the Fifth Circuit is in conflict with the decisions of the Courts of Appeals for the Fourth and Eighth Circuits. In arguing this, Petitioners cite two cases *Lekkas v. Liberian M/V Caledonia,* 443 F.2d 10, (4th Cir. 1971) and *English v. 21st Phoenix Corporation,* 590 F.2d 723 (8th Cir. 1979), cert. den., 444 U.S. 832 (1979). Both of these cases are clearly distinguishable from the decision in the Court below.

In *Lekkas, supra,* the defendant, the vessel owner, requested the District Court to decline subject matter jurisdiction since the suit, based on a maritime personal injury, was brought by foreign seamen under the Jones Act against a foreign ship owner for injuries occurring in foreign waters. This was a decision which was within the Court's discretion based on the argument of forum non convienens. After the defendant ship owner declined to answer interrogatories about its business, the District Court granted the motion to decline. On appeal, the Fourth Circuit reversed the decision of the District Court finding that the District Judge had abused his discretion to grant the motion to decline without allowing or re-

quiring an inquiry into defendant's business, including the defendant's potential allegiance to the United States. The defendant had not challenged the Court's personal jurisdiction over him, so the Court clearly had the power based on its personal jurisdiction over the defendant to require further inquiry into the defendant's allegiance. The Fourth Circuit only advised in its decision reversing the District Court that the District Court might use sanctions under Rule 37(b) of the Federal Rules of Civil Procedure in order to require the defendant to answer interrogatories regarding its allegiance. The situation in *Lekkas, supra,* is significantly different from this case because in *Lekkas,* personal jurisdiction was clearly established, while in the case at bar there was absolutely nothing in the record upon which to base a finding of personal jurisdiction, and in fact, every indication in the record was contrary to jurisdiction, i.e., both Arosa and Inversiones are Panamian corporations and all the directors, stockholders, and officers are Panamian and reside in Panama [R. 178].

Petitioners then argue that the decision below is in direct conflict with the decision of the Court of Appeals for the Eighth Circuit in *English v. 21st Phoenix Corporation,* 590 F.2d 732 (8th Cir. 1979), cert. den. 444 U.S. 832 (1979). Again, the decision of the Court below can be readily distinguished from this Eighth Circuit decision. In *English, supra,* plaintiffs brought a diversity action in Nebraska against a Delaware corporation. The defendant challenged the Court's personal jurisdiction over it, and failed to respond to discovery. As a result of defendant's further failure to respond to discovery on a jurisdiction issue, and failing to comply with orders compelling response to that discovery, the District Court ordered Sanc-

tions under Federal Rule of Civil Procedure 37(b) deeming personal jurisdiction established over the defendant. The Eighth Circuit Court of Appeals upheld the District Court's ruling because it expressly found from the record that facts in the record would have supported a finding of personal jurisdiction. *English, supra,* at 728 n. 6. The Court of Appeals for the Fifth Circuit in the decision below expressly relied on this language in the *English* opinion to find that the *English* case was clearly distinguishable from the case before the Court below. The Court below found that the record, as it stands, does not support a finding of personal jurisdiction, but rather supports the opposite finding. The Court below only decided the very narrow issue that the District Court could not enter default judgment on the merits without a finding of personal jurisdiction over the defendants and without any evidence in the record to support the finding of personal jurisdiction.

The Petitioners would give a very broad reading to the opinion of the Court below, arguing that the Fifth Circuit decision holds for the proposition that the District Court is powerless to enforce discovery sanctions on a defendant challenging personal jurisdiction. This is not the decision of the Court below. Rather, the decision of the Court below only decided that in this particular case, that the District Judge had erred in granting a default judgment on the merits against the defendants for failing to comply with discovery, without finding personal jurisdiction over the defendants and without any support in the record for such a finding.

Petitioners offer a third case as being in conflict with the decision from the Court below. *Haskins v. Lister,* 626

F.2d 42 (8th Cir. 1980). This case is clearly distinguishable from the decision below because the Court in *Haskins* imposed the sanction of default judgment because of the refusal by the defendants who had not challenged personal jurisdiction to comply with discovery on the merits of the case. Again, the Court was not faced with the challenge of personal jurisdiction, it had been clearly established before the default judgment was entered.

The case now before this Court is not repugnant with decisions in the Fourth and Eighth Circuits, and as a result there is no need for certiorari to resolve a conflict among the circuits.

II.

THE FIFTH CIRCUIT APPLIED THE PROPER TEST FOR DETERMINING IN PERSONAM JURISDICTION.

The Fifth Circuit Court of Appeals found that the Petitioners failed to prove that the defendants had the requisite minimum contacts with the State of Texas to support a finding of jurisdiction over those defendants by the United States District Court for the Southern District of Texas. This minimum contact test was the test set out by the Supreme Court in *International Shoe v. Washington,* 236 U.S. 310 (1945). It is clear that the due process requirement of the Fifth Amendment to the Constitution of the United States requires the employment of the *International Shoe* minimum contacts test and the requisite State Long Arm Statute to determine if due process would allow the particular Federal District Court to have

personal jurisdiction over a defendant. *Honeywell, Inc. v. Metz Apparatewerke,* 509 F.2d 1137 (7th Cir. 1975); *Wells Fargo Company v. Wells Fargo Express Company,* 556 F.2d 406 (9th Cir. 1977). The Court in Honeywell set out appropriate standards for the determination of personal jurisdiction in a case which involved the Federal Patent laws, *Honeywell, supra* at 1144:

> The test, then, is a flexible one which emphasizes the reasonableness of subjecting a defendant to suit; and the proper inquiry is whether the non-resident defendant can be said to have invoked, by act or conduct, the benefits and protection of the laws of the forum. [Citations omitted.]

The Ninth Circuit Court of Appeals pointed out that the minimum contacts requirements of due process are not all that must be met before an assertion of in personam jurisdiction would be proper, stating in their decision in *Wells Fargo, supra* at 416:

> . . . not only must the requirements of due process be met before a court can properly assert in personam jurisdiction, but the exercise of jurisdiction must also be affirmatively authorized by the legislature.

In the *Wells Fargo* case, the plaintiffs sought to aggregate all the claims against a corporation in a Federal District Court in Nevada even though those claims did not all arise in Nevada. The Court held that the plaintiffs could not do this absent some authority in the Nevada Long Arm Statute which would allow the plaintiffs to do so. Petitioners now before this Honorable Court argue that the defendants alleged de minimus con-

tacts with the United States should be sufficient to allow the defendants to be hailed into Court in the Southern District of Texas. There is simply no probative authority for this proposition.

Petitioners seek to support their argument by citing a number of cases in which Congress specifically provided by statute for nationwide service of process. All of these cases are distinguishable, and it is clearly established that in the absence of such statutory authority for nationwide service of process and nationwide in personam jurisdiction, the relevant test is that set out in *International Shoe v. Washington, supra,* together with an examination of the Texas Long Arm Statute to determine whether or not the particular forum would have in personam jurisdiction over a defendant. *Honeywell, supra; Wells Fargo, supra.*

Petitioners rely on the case of *Driver v. Helms,* 577 F.2d 147 (1st Cir. 1978), reversed on other grounds, sub nom., *Stafford v. Briggs,* 100 S.Ct. 774 (U.S. 1980), to support their argument that the defendants' contacts with the United States are all that are necessary to be established for there to be personal jurisdiction in any of the Federal District Courts of the United States. This is simply not the case as pointed out by this Court in its opinion in *Stafford v. Briggs,* 63 L.Ed.2d at 13:

> "Absent the clear indication that Congress intended such a sweeping effect [personal jurisdiction in all of the Federal District Courts over an individual defendant not having contacts with all of those individual forums], we will not infer such a purpose nor will we interpret a statute to effect that result."

In *Stafford v. Briggs, supra,* and *Driver v. Helms, supra,* this Court and the First Circuit Court of Appeals were faced with the interpretation of a particular Federal statute applying to service of process and jurisdiction over Federal Government officials being sued by private U.S. citizen plaintiffs. 28 U.S.C.A. § 1391(e). It is clear that this particular statute expressly provides for nationwide service of process which this Court found within Congress' power, but this Court also found that that statute withstood constitutional muster on due process grounds. Another case Petitioners rely on to support their argument that contact with the U.S. is sufficient is *Mariash v. Morrill,* 496 F.2d 1138 (2nd Cir. 1974). The *Mariash* case was brought under the Securities Exchange Act of 1934 which has a specific provision for nationwide service of process. 15 U.S.C.A. § 78aa. The Court found that Congress has the power to determine the jurisdiction of the Federal District Courts, to set the boundaries of their jurisdiction, and further that this particular statute was constitutional if it comported with Fifth Amendment due process requirements. The *Mariash* case is clearly distinguishable from the case now before this Court because in this case, there is no statute which provides for such nationwide service of process, in this area of admiralty and maritime law. Congress has not acted to define every Federal District Court's bounds of jurisdiction as being the entire United States.

This case was brought under the Jones Act and the general maritime law. There is no statute governing personal jurisdiction or service of process under the general maritime law so the appropriate inquiry would be that used by the Fifth Circuit in looking to the Texas Long

Arm Statute to determine if a particular Federal District Court has personal jurisdiction over a particular defendant. *Stafford v. Briggs, supra.* The Jones Act, however, specifically provides which forum is the appropriate one and which forum has personal jurisdiction over a defendant. The Act, 46 U.S.C.A. § 688 states as follows:

> "Jurisdiction in such actions shall be under the Court of the District in which the defendant employer resides or in which his principal office is located."

The record in this case shows that the defendants are Panamanian corporations, all of their directors, officers and stockholders reside in Panama, and the plaintiffs were unable to find any office of either defendant within the Southern District of Texas. Clearly, whether reference is had to the Jones Act or to the general maritime law and the Texas Long Arm Statute, there is no indication in the record, in fact, the record is completely contra to the finding of personal jurisdiction in the United States District Court for the Southern District of Texas. Petitioners do not challenge the method employed by the Fifth Circuit Court of Appeals in the decision below in interpreting the Texas Long Arm Statute, they only challenge the Court's reliance on the interpretation of the Texas Long Arm Statute. The cases support the appropriateness of looking to the Texas Long Arm Statute to determine if the U.S. District Court for the Southern District of Texas would have personal jurisdiction over the defendants in the case now before the Court. This is the test employed by the Court below, and therefore, certiorari should be denied to determine whether or not the Fifth Circuit's inquiry was appropriate. It plainly was appropriate and correct.

III.

CERTIORARI SHOULD BE DENIED BECAUSE THE DECISION IN THE COURT BELOW DOES NOT CONFLICT WITH THIS COURT'S DECISIONS ON THE DETERENCE FUNCTION OF DISCOVERY SANCTIONS.

The Court of Appeals in the decision below found only that the District Judge could not enter a default against the defendants on the merits because there had been no finding of personal jurisdiction over the defendants. This decision does not create any conflict with decisions of this Court on the deterence function of discovery sanctions.

Petitioners rely heavily on three cases to support this conflict argument. The first is *National Hockey League v. Metropolitan Hockey Club,* 427 U.S. 639 (1976). In this case, the District Court dismissed the plaintiff's case for failure to comply with discovery orders. This Court found, however, that the sanction and dismissal was appropriate because of the plaintiff's flagrant bad faith. There was never an issue of jurisdiction because the sanction was applied against the plaintiff, who had availed itself of the Court's jurisdiction with the filing of its suit. Then, having called upon the Court to redress wrongs allegedly committed by the defendants, plaintiff failed to comply with discovery reaching the merits of plaintiff's claims. It is clearly distinguishable from a case like the one before the Court in which the District Court never established personal jurisdiction over the defendants. Rather, the defendants in the case now before the Court did not avail themselves of the Court's jurisdiction but rather challenged the propriety of that jurisdiction

as well as challenging venue, sufficiency of process and sufficiency of service of process.

The next case relied on by petitioners to support their "conflict" argument is *Roadway Express, Inc. v. Piper,* 100 S.Ct. 2455 (1980). In this c. e the District Court imposed sanctions on plaintiff's counsel, taxing them with the winning parties' counsel fees, as a penalty for plaintiff's deliberate delay of the Court proceedings and their vexatious conduct. In *Roadway Express,* plaintiffs failed to comply with discovery requests and orders. Again, it was the wrongful activity of the plaintiff who had first availed itself of the Court's jurisdiction and who chose to ignore direct orders of the Court. Personal jurisdiction over the plaintiff was certainly never an issue. The Petitioners also rely on *ACF Industries, Inc. Carter Carburetors Division v. Equal Employment Opportunity Commission,* 439 U.S. 1081. This is yet another case in which this Court upheld the imposition of discovery sanctions on the plaintiff for failing to comply with discovery orders. Discovery went to the heart of the merits of plaintiff's claim.

In all of these cases which Petitioners allege conflict with the decision below, sanctions were imposed against the plaintiffs for failing to comply with discovery which went directly to the merits of the plaintiffs' claims. The case now before the Court is a far cry from that situation. Personal jurisdiction is not supported by evidence in the record over these defendants and the District Court never found personal jurisdiction. The defendants did not avail themselves of the District Court's jurisdiction, nor did they have sufficient contacts with the State of Texas to support jurisdiction. Discovery did not go to the merits

of the case, but only dealt with the issue of personal jurisdiction. The Fifth Circuit panel, in its decision held only that there was no personal jurisdiction on which to base the District Court's default judgment. In fact, the Petitioners could not cite any case in which the discovery sanction of default judgment on the merits imposed on a defendant challenging jurisdiction without any evidence in the record to support personal jurisdiction of the Court. Rather, in every case relied upon by Petitioners, it was already clear from the record that personal jurisdiction had been established, or from the evidence already in the record, personal jurisdiction could be found and was found by the various Courts. In this case, the District Judge never found personal jurisdiction, and every indication from the record is that personal jurisdiction should not lie in the Southern District of Texas. Therefore, certiorari need not be granted in this case to resolve a conflict between the decision below and this Court's decisions on discovery sanctions, but rather there is no such conflict. Certiorari should be denied.

IV.

CERTIORARI SHOULD BE DENIED, BECAUSE THE DECISION BELOW DOES NOT CONFLICT WITH THIS COURT'S DECISIONS ON JURISDICTION TO DETERMINE JURISDICTION IN ADMIRALTY CASES.

The present case was brought under the District Court's admiralty jurisdiction, 28 U.S.C. § 1333, and the Jones Act. Subject matter jurisdiction was never challenged by the defendant, but rather personal jurisdiction was challenged. The defendant never challenged the District Court's jurisdiction to determine whether this case fell

within its admiralty jurisdiction. As already pointed out in Respondent's second argument, the Jones Act, one of the bases of subject matter jurisdiction in this case, clearly provides for a forum which from the record is not the Southern District of Texas. Additionally, as already argued in Respondent's second argument, the general maritime law does not provide for a particular forum so that reference must be had to the Texas Long Arm Statute which the Fifth Circuit referred to in its decision below.

Petitioners seek to establish a conflict between the decision in the Court below and two cases which clearly deal with subject matter jurisdiction of a Court sitting in admiralty. The Petitioners first rely on *Swift & Company Packers v. Compania Columbiana Del Caribe*, 339 U.S. 684 (1950). The issue in that case went to the very heart of admiralty jurisdiction. It involved whether or not a writ of foreign attachment on a vessel should have been vacated where the activities challenged by the plaintiffs seeking to impose the writ were non-maritime in nature. This Court explained the purpose of a writ of foreign attachment, *Swift & Co., supra* at 693:

> "The process of foreign attachment is known of old in the admiralty. It has two purposes: to secure a respondent's presence and to assure satisfaction in case the suit is successful. [Citation omitted]."

There was no question in *Swift* that the District Court had personal jurisdiction over the defendants, and needed only to determine whether or not a maritime remedy could be employed to right a non-maritime wrong. The decision in the Court below does not conflict or in any way undercut or circumvent the decision of *Swift & Co.*,

supra, because it is only a procedural issue and does not go to the subject matter of admiralty.

Petitioners also rely on the case of *Hellenic Lines, Ltd. v. Rhoditis,* 398 U.S. 306, rehearing den. 400 U.S. 856 (1970). In this case the issue was whether an alien resident owner was a Jones Act employer. No challenge was ever made to the Court's personal jurisdiction over the defendant owner, and it was clearly established that the defendant was operating in the United States with vessels calling at all of the various ports of the United States. The only issue to be decided was whether or not the defendant vessel owner was a Jones Act employer, a matter of subject matter jurisdiction, into which the Court could inquire. Since the Jones Act itself provides for the appropriate forum in which personal jurisdiction is established against a Jones Act employer, it is difficult to understand how there could be a conflict in the decision of the Court below which found that the Southern District of Texas was not the appropriate forum, and the decision of this Court in *Helle c Lines* which determined that a District Court could inquire as to the allegiance of a defendant owner to determine whether or not he was a Jones Act employer. The procedural test for personal jurisdiction is clear and unequivocal. The District Court failed to find personal jurisdiction and the record did not indicate any evidence of personal jurisdiction in the Southern District of Texas. There is no conflict between the decision in the Court below and the decisions in *Hellenic Lines, supra,* or *Swift & Company, supra,* cases in which personal jurisdiction was not an issue but rather the issue was the bounds of subject matter jurisdiction of admiralty. Therefore, certiorari should not be granted to resolve this non-existent conflict.

V.

CERTIORARI SHOULD BE DENIED BECAUSE THE DECISION OF THE FIFTH CIRCUIT IN THE CASE BELOW DOES NOT CONFLICT WITH THIS COURT'S DECISION IN U.S. v. UNITED MINE WORKERS OF AMERICA.

The decision below is limited to reversing the entry of Default Judgment on the merits against the Defendants where the District Judge failed to find personal jurisdiction over the Defendants and where the evidence in the record failed to support a finding of personal jurisdiction. The Petitioners argue that this decision is in conflict with this Court's decision in *United States v. United Mine Workers of America,* 330 U.S. 258 (1947). This alleged conflict simply does not exist. In *United Mine Workers, supra,* the Court only upheld a temporary restraining order designed to maintain the status quo in order to determine if it had subject matter jurisdiction over the case. It then punished the violation of that restraining order with criminal contempt. Personal jurisdiction had been established over the party cited for contempt. Personal jurisdiction was never established in the case now before this Court.

Petitioners also argue that there is a conflict within the Fifth Circuit itself between the holding in the case below and the Fifth Circuit's decision in *State of Florida v. Treasure Salvors,* 621 F.2d 1340 (5th Cir. 1980). Again, the cases are completely distinguishable. The Court in *Treasure Salvors, supra,* was faced with a challenge to its in rem jurisdiction and not to in personam jurisdiction. The Court then exercised its ancillary process over the res. The Fifth Circuit in its opinion in the case

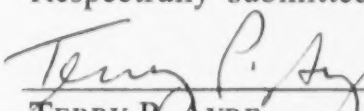
below held only that a default judgment could not be entered against the Defendants where the District Judge did not find jurisdiction over the persons of the Defendants.

Therefore the conflict perceived by Petitioners is non-existent, and the Petition should be denied.

CONCLUSION

The decision of the Fifth Circuit Court of Appeals in the case below was very strictly limited to a finding by the Court of Appeals that the District Court had not found personal jurisdiction over the defendants, and that the record did not establish or independently indicate any personal jurisdiction over the defendants. On this ground and this ground alone, the Fifth Circuit reversed the District Court's imposition of a default judgment on the merits of the case against the defendants. This very limited decision does not conflict with other cases in the various circuits imposing discovery sanctions for failure to comply with discovery on the merits of a case and imposing defaults or dismissals on recalcitrant parties. Therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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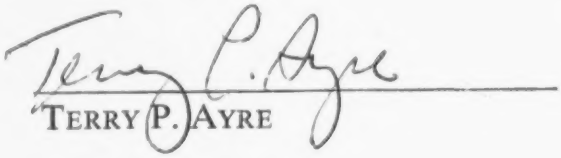
CERTIFICATE OF SERVICE

I hereby certify that pursuant to United States Supreme Court Rule 28.3, that all counsel of record herein have been served with three (3) copies each of this Opposition to the Petition by depositing the same in the United States mail, first class postage prepaid, properly addressed to counsel, at its post office address.



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